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IN THE
Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

In parallel with the petition of the FCC and the United States, our petition sought to demonstrate that further review is warranted (1) by the exceptional importance of broadband and the way in which it is regulated; (2) by the court of appeals' refusal to defer to the FCC's reasonable exercise of congressionally delegated authority; and (3) by a persistent conflict of authority concerning a question relating to *stare decisis*. The three respondents that oppose the petitions (Earthlink, Brand X, and the CPUC) agree with us on the first point,[1] but disagree on the others. As shown below, however, their objections are unpersuasive.

I. THE FCC'S READING IS REASONABLE.

A. Respondents' primary argument for denying the petitions is that the statute unambiguously (*i.e.*, as a matter of *Chevron* "step one") precludes the FCC's interpretation — a view that, they say, the Ninth Circuit embraced.[2] That is an inaccurate description of the *Portland* and *Brand X* opinions. Because the *Portland* court wrote before the FCC acted, it had no reason to — and did not — determine whether, for *Chevron* purposes, the statute compelled any one reading. Nor did the *Brand X* court view the *Portland* precedent that way.[3] At best, then, respondents can argue only that the *Brand X* court *could*

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[1] *See, e.g.*, Earthlink at 13 ("the question is important").

[2] *See, e.g., id.* at 25-26 ("the Ninth Circuit's decision in *Portland* was based on a plain meaning analysis that was equivalent to a *Chevron* step one analysis"); Brand X at 22 (describing *Brand X* opinion as "concluding that [the Ninth Circuit's] earlier decision in *AT&T v. City of Portland* had established the plain meaning of the 1996 Telecommunications Act"); CPUC at 11 (stating that *Portland* court "undert[ook] a *Chevron* step-one type analysis").

[3] *See* Pet. App. 17a ("we never stated in *Portland* that our interpretation was the only one possible").

have based its decision on a "step one" ground. But that alternative ground has never been embraced by even a single court: it is supported only by respondents' say-so.

Moreover, it is clearly wrong. The FCC's interpretation — under which "telecommunications" is a "telecommunications service" only when it is sold on a stand-alone basis — is reasonable. "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public."[4] Those words do not compel a reading that captures functionality not sold on a stand-alone basis.[5] Contrary to respondents' arguments,[6] the FCC did not read "on a stand-alone basis" into the statute; rather, it reasonably interpreted ambiguous language,[7] while at the same time carefully avoiding a reading that would render any "statutory term superfluous."[8]

It is unconvincing for Earthlink to argue that, if a cable-modem-service-providing cable operator is providing an "information service," it must also be providing "telecommunications" to the public, and thus a "telecommunications service."[9] The Communications Act defines "information service" as involving access to information "via

[4] 47 U.S.C. § 153(46).

[5] *See Random House Webster's Unabridged Dictionary* 1344 (2001) ("to offer" means "to present for sale"); *id.* at 747 ("for" means "in consideration or payment of"); *id.* at 706 ("fee" means "a sum paid or charged for a privilege"); *id.* at 559 ("direct" means "without intervening persons, influences, factors, etc.").

[6] *See* Earthlink at 18; CPUC at 20-21.

[7] *See, e.g., Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 47 (2002) (far from having "insert[ed] words into the statute," agency carried out its duty to "resolve any ambiguities and fill in any holes in the statutory scheme").

[8] *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003).

[9] Earthlink at 22-24.

telecommunications" — not via "telecommunications service."[10] Cable modem service does involve "telecommunications": it plainly involves "transmission . . . of information."[11] This "telecommunications," however, is not offered separately. Because it is thus not being "offer[ed] . . . for a fee directly to the public," there is no "telecommunications service."[12]

Indeed, accepting respondents' arguments would mean that *all* ISPs constitute providers of "telecommunications service." ISPs provide the same service to the end user whether they are affiliated or unaffiliated with the owner of the local distribution network.[13] That would mean that even ISPs like Earthlink and Brand X would be subject to regulation as telecommunications carriers. Respondents obviously do not favor that outgrowth of their reasoning and try to avoid it by arguing that only *facilities-based* firms can provide "telecommunications service."[14] That notion, however, has no basis in the statute: the definition of "telecommunications service" contains no requirement that a provider own facilities. The contortions needed to avoid the consequences of respondents' reasoning demonstrate its basic infirmity.

B. Next, respondents argue that the FCC's interpretation is at odds with the agency's pre-1996-Act *Computer* policies, which, respondents apparently believe, means

[10] 47 U.S.C. § 153(20).

[11] *Id.* § 153(43).

[12] *Id.* § 153(46).

[13] *Cf. United States v. Western Elec. Co.*, 907 F.2d 160, 163 (D.C. Cir. 1990) ("A taxi company . . . offers taxi service for hire whether or not it owns or leases its cabs.").

[14] *See* CPUC at 21 n.8; *see also* CPUC Ninth Circuit Br. at 27-28, 31; Earthlink Ninth Circuit Br. at 39 n.12; Brand X Ninth Circuit Br. at 31 n.35; Earthlink Ninth Circuit Reply Br. 19-20 n.11.

that the FCC's reading is unreasonable for purposes of *Chevron* "step two." That is wrong too.

1. In the 1960s, technological progress made it possible to use telephone lines to connect mainframe computers to remote terminals. This raised two questions for the FCC: (1) whether computer services made available over telephone lines should be subjected to regulation, and (2) whether the computer-services business should be open to telephone companies.[15] In connection with the former question, the FCC was reluctant to regulate competitive parts of the economy only indirectly related to its communications mandate.[16] On the latter question, the FCC feared that, if telephone companies were permitted to hold a competitive stake in the adjacent industry, they would acquire an incentive to deny computer-services rivals essential telephone inputs, thereby leveraging their market power from the naturally monopolistic telephone industry into the competitive computer-services industry.[17]

In the end, the FCC decided not to regulate the computer-services industry: "enhanced services" (the rough equivalent of today's "information services") would remain unregulated — even though they involved "communications by wire" and were thus within the agency's regulatory jurisdiction.[18] In addition, the FCC decided to permit telephone companies to provide computer services, subject to certain regulatory safeguards. In particular, the FCC formulated a policy that all telephone companies should continue to make available the "basic" telecommu-

[15] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, ¶ 16 (1980) ("*Computer II*").

[16] *See id.* ¶ 116.

[17] *See id.* ¶¶ 15, 18.

[18] *See id.* ¶¶ 114, 119, 121, 124, 127.

nications services underlying their "enhanced" computer-related services on tariffed terms.[19] That way, computer-service rivals would have equal access to telephone inputs.

Later, the FCC was compelled to add an auxiliary principle: that telephone companies cannot avoid common-carrier regulation by bundling computer functionality with basic services. In drawing the line between "basic" and "enhanced," the FCC had held that, whenever a basic service is bundled with an enhanced service, the bundle constitutes an enhanced service.[20] Pointing to this logic, telephone companies sought to liberate themselves from common-carrier regulation by arguing that, if they added enhanced services to basic services, the product was enhanced and therefore unregulated. The FCC disagreed: telephone companies would not be allowed to use this reasoning to skirt their pre-existing obligations.[21]

[19] *See id.* ¶ 231 ("those carriers that own common carrier transmission facilities and provide enhanced services . . . must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized"). Insofar as common carriers not owned by AT&T or GTE were concerned, this policy was not formally codified in a regulation. *See id.* at pp. 498-99.

[20] *See, e.g., id.* ¶ 110 ("Providers of . . . computer services acquire the necessary transmission facilities from communications common carriers pursuant to tariff, and resell this transmission capability as part of their enhanced offering."); *Independent Data Communications Mfrs. Ass'n, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717, ¶ 18 (CCB 1995) (providers of "enhanced protocol processing services in conjunction with basic transmission services have historically been treated as unregulated enhanced service providers").

[21] *See, e.g., Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 4 FCC Rcd 1, ¶ 274 (1988) ("the addition of . . . enhancements . . . to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations"); *Inde-*

2. According to respondents, the FCC's decision that cable modem service does not contain a separate telecommunications service is inconsistent with this auxiliary principle.[22] By its terms, however, the *Computer* policy applies only to "carriers that own common carrier transmission facilities."[23] As providers of cable-television service, cable operators have never been considered common carriers.[24]

Nor does the *reasoning* in the *Computer* orders compel treating cable modem service as having a separate "telecommunications service" component. It is true that, in the *Computer* context, the FCC ruled that a common carrier cannot avoid tariffing a basic service by bundling it with computer functionality. As the FCC reasonably determined, however, that does not imply that it should compel tariffing when a company has never offered the service in question (or, for that matter, any other service) on a common-carrier basis.[25] Indeed, even in the telephone context, the *Computer* principles have never been applied to compel the common-carrier offering of a service that a telephone company did not previously offer on a stand-alone basis voluntarily.[26]

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pendent Data ¶ 44 (contrary rule "would allow circumvention of the *Computer II* and *Computer III* basic-enhanced framework").

[22] *See* Earthlink at 19-20; Brand X at 25-26; CPUC at 24.

[23] *Computer II* ¶ 231.

[24] *See* 47 U.S.C. § 541(c); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169 n.29 (1968); *Philadelphia Television Broad. Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966).

[25] *See* Pet. App. 95a (¶ 43) ("EarthLink invites us, in essence, to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act. Such radical surgery is not required.").

C. Respondents make three other telecommunications-related arguments. *First*, respondents suggest that the possibility of forbearance makes this case undeserving of the Court's attention — on the theory (1) that Section 10 of the Communications Act does not hold its forbearance hoops very high, and (2) that, in any event, jumping through those hoops is statutorily required.[27] The latter assumes the answer to the question presented: whether the FCC is required to jump through Section 10's hoops depends on whether cable modem service is a "telecommunications service." The former is simply wrong: Section 10(a) requires the FCC to make detailed findings that are reviewable in court,[28] which no doubt explains respondents' efforts to force the FCC down this route.

Second, Earthlink argues that the FCC's interpretation of "telecommunications service" is never entitled to deference.[29] This is so, Earthlink argues, because a 1976 D.C. Circuit decision suggested that the term "common carrier" was so well-defined at common law as to strip the FCC of interpretive discretion.[30] But the D.C. Circuit's opinion in that case stated only that the FCC may

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[26] Contrary to respondents' arguments (Brand X at 26; CPUC at 24), the FCC's refusal to extend *Computer II* to cable operators does not violate the "regardless of the facilities used" language in 47 U.S.C. § 153(46). Respondents are seeking to use *Computer II* to make "telecommunications service" out of something that otherwise would not be and thus is not within the definition of Section 153(46).

[27] *See* Earthlink at 29-30; Brand X at 29-30; CPUC at 27.

[28] *See* 47 U.S.C. § 160(a).

[29] *See* Earthlink at 16-17.

[30] *See id.* at 16 (citing *National Ass'n of Regulatory Utility Commissioner's v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976)).

not define "common carrier" in a way contrary to the common law, something that the FCC has not done here. Indeed, more recently, the D.C. Circuit held that the FCC's interpretation of "telecommunications service" *is* entitled to *Chevron* deference.[31]

Finally, the CPUC relies on Section 706(a) — ironically, a provision urging regulators to promote new services through deregulation — as indicating that Congress intended to subject cable modem service to common-carrier regulation.[32] Although the FCC has said (in passing, when nothing turned on it) that cable modem service constitutes "advanced telecommunications capability" for purposes of Section 706,[33] that reading plainly was not compelled by Section 706's text. Thus, Section 706(a) cannot be read as an implicit indication that Congress believed that cable modem service includes a "telecommunications service." Besides, even though Section 706 addresses bodies "with regulatory jurisdiction over telecommunications services," that does not mean that Congress believed that all capabilities promoted must necessarily constitute "telecommunications services."

II. GRANTING REVIEW WOULD ENABLE THE COURT TO RESOLVE A CONFLICT OF AUTHORITY CONCERNING *STARE DECISIS*.

Our petition further demonstrates that granting review would afford the Court an opportunity to resolve a conflict of authority concerning the question whether a court of appeals may decline to accord *Chevron* deference to an agency's reasonable interpretation of ambiguous statutory

[31] *See Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999).

[32] *See* CPUC at 22-23, 25.

[33] *See* Pet. App. 126a (¶ 70).

language where a circuit precedent antedating the agency's decision interpreted that language differently. Respondents answer by saying that the conflict is not implicated — on the theory that "the Ninth Circuit's decision in *Portland* was based on a plain meaning analysis that was equivalent to a *Chevron* step one analysis."[34] As already explained, however, that is an inaccurate description of the *Portland* decision: the Ninth Circuit had no reason to and did not determine whether the statute is unambiguous.

Brand X and the CPUC (but not Earthlink) also deny that a conflict of authority exists in the first place. According to these respondents, "most" of the cases we cited predate *Neal*, and must therefore be assumed to have been superseded.[35] They ignore that the language in *Neal* was preceded by similar language in *Maislin* and *Lechmere*, and that, despite that language, various courts of appeals adopted an approach different from that of the Ninth Circuit. Respondents' suggestion that *Neal*'s unexplained omission of the word "clear" will cause these courts to repudiate their position is not credible.

Indeed, post-*Neal* decisions show precisely that: courts have adhered to their prior approaches. Respondents attempt to minimize *Heimmermann* as "neither cit[ing] nor discuss[ing] *Neal*,"[36] but fail to mention that the *Heimmermann* court adhered to *Oman* even though the appellant had expressly requested overruling in light of *Neal*.[37] Respondents attempt to minimize *Reich* as also resting on

[34] Earthlink at 25-26; *see also* CPUC at 29.

[35] *See* CPUC at 28 n.10.

[36] *Id.*

[37] *See* Appellant's Brief at 5 n.3 (available at 2001 WL 34121025) ("*Oman* was decided before *Neal*, which expressly limited *Chevron* deference to situations where a court has not already issued a statutory interpretation").

an alternative ground,[38] but do not explain why that signals a change in direction. Finally, respondents attempt to minimize *Aguirre* as representing a voluntary revisiting of prior precedent,[39] thereby engaging in an exercise in semantics: *Aguirre* adhered to the Second Circuit's view that, despite prior precedent, courts must give deference to reasonable agency interpretations.[40]

Finally, only Brand X defends the merits of extending *Neal* to the court of appeals level. According to Brand X, doing so does not threaten uniformity — on the theory that the Hobbs Act channels review of FCC decisions to a single court in any event.[41] But the Hobbs Act applies to only a few agencies, and then to only some of their decisions.[42] Besides, even where it applies, the Hobbs Act does not solve the uniformity problem when the same issue arises in separate cases.[43]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[38] CPUC at 28 n.10.

[39] *See id.*; Brand X at 23 & n.66

[40] *See Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir.1996) ("the interests of nationwide uniformity outweigh our adherence to Circuit precedent").

[41] *See* Brand X at 22 n.64.

[42] *See* 28 U.S.C. § 2342.

[43] *See, e.g., Nixon v. Missouri Mun. League*, 124 S.Ct. 1555 (2004) (resolving conflict between courts of appeals that, each hearing appeals pursuant to the Hobbs Act, had reached different results).

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